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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 152.....

THE BUCKEYE UNION CASUALTY COMPANY,
Petitioner and Appellant below,

vs.

PAT J. RANALLO
and
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondents and Appellees below.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit, and
BRIEF IN SUPPORT THEREOF.

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INDEX.

upon the Hinman Brothers Construction Company a "liability by law for damages" (Insuring Agreement I of Buckeye Union policy) where the plaintiff and United States Fidelity and Guaranty Company settled and agreed upon in advance the findings of fact, the conclusions of law and the amount of judgment, prior to the rendition of said judgment and without the knowledge or consent of the nominal defendant, Hinman Brothers Construction Company?..... 23

V. Is United States Fidelity and Guaranty Company, third party defendant, having entered into an agreement which amounts to a voluntary settlement with Ranallo, the original plaintiff, thus discharging its primary liability under its contract, estopped from obtaining contribution from The Buckeye Union Casualty Company either directly or indirectly?..... 25

VI. Did the evidence introduced by Ranallo, appellee, against appellant at the hearing of the supplemental complaint establish a prima facie case against the appellant?..... 27

VII. Can the plaintiff and the United States Fidelity and Guaranty Company use the courts for the purpose of forcing The Buckeye Union Casualty Insurance Company to contribute to their agreed settlement, by waiving a jury, going through the form of a trial to the Court and asking the presiding judge to render a judgment against Hinman Brothers Construction Company for the agreed amount of $15,000.00 and thereby fix a liability upon The Buckeye Union Casualty Company for a proportionate share of such judgment when Hinman Brothers Construction Com-

TABLE OF AUTHORITIES.

Cases.

Texts.

Statutes.

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THE BUCKEYE UNION CASUALTY COMPANY,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Buckeye Union Casualty Company, an Ohio corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered on or about the 14th day of April, 1943, affirming a judgment of the District Court of the United States for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

1. An opinion written by the Honorable Emerich B. Freed, District Judge, is found in the printed record at page 170 and reported in 49 Fed. Supp. 920.

2. The Circuit Court of Appeals did not render any written opinion.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered April 14, 1943.

2. Jurisdiction of this Court is invoked under Section 240 (a) of the judicial code, as amended, by the Act of Feb. 13, 1925 (Federal Code annotated Title 28 Par. 347a).

3. This is a case of great general and public importance involving questions of primary and secondary insurance not heretofore passed on by this Court, and also involves the question of the right of an insurance company to bind its assured by judgment without the assured's knowledge or consent in order to attempt to enforce against another insurance company Section 9510-4 of the General Code of Ohio.

4. The judgment of the Courts below will seriously affect the administration of justice in other insurance cases throughout the nation.

PERTINENT STATUTE AND POLICY CONDITIONS.

Section 9510-4 of the General Code of Ohio, effective October 3, 1933, provides as follows:

> "Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the in-

surance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which said judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law."

Insuring Agreement II of the U. S. Fidelity & Guaranty insurance policy provides in part as follows:

"It is further agreed that as respects insurance afforded by this policy under Coverages A and B the Company shall

"(a) defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company."

Insuring Agreement I of the Buckeye Union Casualty Company's insurance policy provides in part as follows:

"To Pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons not employed by the Insured or to whom the Insured may be held liable under any Workmen's Compensation Law."

Condition "E" of the Buckeye Union Casualty Insurance Company's policy provides as follows:

"No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the conditions hereof, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after *actual trial* or by written agreement of the Insured, the claimant, and the Company, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement."

QUESTIONS PRESENTED.

I. Has an insurance company in a supplemental proceeding under Section 9510-4 of the General Code of Ohio the right to inquire into the proceedings in the original action in order to establish its policy defenses?

II. In a supplemental proceeding against it, is an insurance company estopped from presenting its claims against a third party defendant, also an insurance company, in order to determine which of the companies is liable for the judgment against the common assured in the original action?

III. Did Ranallo, plaintiff in the original case, by entering into what amounts to an agreed judgment with the United States Fidelity and Guaranty Company, third party defendant, violate condition "E" of appellant's policy of insurance (*supra*) and thereby relieve the appellant from any liability under its policy?

IV. Does a judgment in the original action brought by Pat Ranallo against Hinman Brothers Construction Company, the common assured, impose upon the Hinman Brothers Construction Company a "liability by law for damages" (Insuring Agreement I of Buckeye Union policy, *supra*) where the plaintiff and United States Fidelity and Guaranty Company settled and agreed upon in advance the findings of fact, the conclusions of law and the amount of the judgment, prior to the rendition of said judgment and

without the knowledge or consent of the nominal defendant, Hinman Brothers Construction Company?

V. Is United States Fidelity and Guaranty Company, third party defendant, having entered into an agreement which amounts to a voluntary settlement with Ranallo, the original plaintiff, thus discharging its primary liability under its contract, estopped from obtaining contribution from The Buckeye Union Casualty Company either directly or indirectly?

VI. Did the evidence introduced by Ranallo, appellee, against appellant at the hearing of the supplemental complaint establish a prima facie case against the appellant?

VII. Can the plaintiff and the United States Fidelity and Guaranty Company use the courts for the purpose of forcing The Buckeye Union Casualty Insurance Company to contribute to their agreed settlement, by waiving a jury, going through the form of a trial to the Court and asking the presiding judge to render a judgment against Hinman Brothers Construction Company for the agreed amount of $15,000.00 and thereby fix a liability upon The Buckeye Union Casualty Company for a proportionate share of such judgment when Hinman Brothers Construction Company is not in any way consulted about the procedure and knows nothing about the judgment against it until after it had been entered?

STATEMENT OF FACTS.

The Buckeye Union Casualty Company, defendant-appellant, on the 30th day of December, 1939, issued its policy of insurance (R. 143) covering the operations of the Hinman Brothers Construction Company on a project described therein. The U. S. Fidelity & Guaranty, defendant-appellee, on the 21st day of June, 1940, issued its automobile policy with a hired car endorsement attached thereto (R. 153) on trucks operated by the Hinman Brothers Construction Company.

On the 25th day of November, 1940, a truck, insured under said policy, while being operated near the project, injured one Pat J. Ranallo, plaintiff-appellee, for which injuries, on the 7th day of January, 1941, an action was brought against the Hinman Brothers Construction Company in the sum of Seventy-five Thousand and no/100 ($75,000.00) Dollars (R. 2). The U. S. Fidelity & Guaranty, under its contract of insurance, undertook the defense of the action for its assured. The Buckeye disclaimed liability under its policy for the accident on the ground that it did not occur on the "insured premises," as defined in its policy of insurance (R. 159). The Hinman Brothers Construction Company took no exception to the position assumed by the Buckeye Union Casualty Company with respect to this accident.

The U. S. Fidelity & Guaranty, under authority of its insuring Agreement II of its policy, through its counsel C. M. Horn, negotiated for and entered into a settlement of the Ranallo action, which settlement, by prearrangement between counsel for Pat Ranallo and C. M. Horn, counsel for U. S. Fidelity & Guaranty Co., on the 27th day of May, 1941, was reduced to an agreed judgment in the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars (R. 84, 85).

Some evidence was offered to support the findings of fact and conclusions of law prepared in advance and submitted to Judge Wilkin for approval immediately following the conclusion of the evidence, but the sole purpose of the evidence was to place the accident on the "insured's premises" as described in the Buckeye policy of insurance in order to invoke their coverage (R. 8, 163, 165). Counsel for Pat Ranallo and the U. S. Fidelity & Guaranty Company neglected to notify either the principal defendant, The Hinman Brothers Construction Company, or the Buckeye Union Casualty Company that the case was to be taken out of its regular order, jury waived, and a judgment for

Fifteen Thousand and no/100 ($15,000.00) Dollars, to be entered on the findings of fact and conclusions of law prepared in advance (R. 56, 57, 62, 90).

Although counsel for Pat Ranallo and the U. S. Fidelity & Guaranty collaborated in all of the proceedings resulting in the agreed judgment (R. 121), the supplemental complaint was filed against the Buckeye Union Casualty Company alone (R. 21). The Buckeye Union Casualty Company filed a third party complaint against the defendant-appellee, the U. S. Fidelity & Guaranty (R. 23), and its answer to the supplemental complaint, wherein it denied in substance that the accident happened on the "insured's premises," as described in their policy of insurance, and alleged that a settlement was effected between the U. S. Fidelity & Guaranty and Pat Ranallo. The U. S. Fidelity & Guaranty Company in its amended answer, after interposing certain defenses, confessed judgment to Pat Ranallo in the sum of Eight Thousand Three Hundred Thirty-three and 34/100 ($8,333.34) Dollars, its alleged pro rata share of the Fifteen Thousand and no/100 ($15,000.00) Dollar judgment (R. 33).

Pat Ranallo, plaintiff-appellee, in his answer to the third party complaint of the Buckeye Union Casualty Company prayed judgment against either one or both of the defendants (R. 32).

It was conceded that the U. S. Fidelity & Guaranty, under its insuring Agreement II, reserved the right to dispose of the claim herein, as it deemed expedient without respect to the wishes of the Hinman Brothers Construction Company (R. 64, 145).

It was admitted that C. M. Horn and his firm were retained and paid by the U. S. Fidelity & Guaranty to represent them in the handling of this claim under its contract of insurance with the Hinman Brothers Construction Company (R. 64, 120, 121).

The Hinman Brothers Construction Company, through its officers, denied that they retained C. M. Horn or his firm

to independently represent its interest in this subject (R. 52, 53, 57, 59, 64).

C. M. Horn, as counsel for the U. S. Fidelity & Guaranty, admitted that he did not consult with or in any manner notify the Hinman Brothers Construction Company or its representatives of any stage of the proceedings, including the hearing, and of the agreed judgment (R. 57, 60, 63).

Counsel for Pat Ranallo and the U. S. Fidelity & Guaranty Company agreed in advance of the original hearing on the amount of the judgment entered in this case (R. 109, 130).

Hon. Judge Wilkin testified without contradiction that Messrs. Sogg and Horn in arranging for the assignment, definitely stated that the case would not be contested as cases are ordinarily contested (R. 85).

It was admitted on all hands that the findings of fact and conclusions of law were prepared in advance of the original hearing and submitted for the court's signature immediately following the conclusion of the testimony (R. 67, 68, 84, 114, 117).

It must be conceded that the sole purpose of including in the original findings of fact and conclusions of law the description of the "insured's premises" was to invoke the insurance coverage of the Buckeye Union Casualty Company.

At the conclusion of the testimony on the supplemental complaint, the court found that the accident was covered by the appellant's policy, that the judgment in the original action was final, and that the plaintiff-appellee could maintain the action under Section 9510-4 G. C. of Ohio, and further held that the appellant and third party defendant were co-insurers and entered judgment accordingly (R. 185).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in affirming the judgment of the District Court of the United States, Northern District of Ohio, Eastern Division, thus resolving all of the above questions against appellant.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals affirmed the District Court's decision that the plaintiff had obtained a judgment in the action instituted by him against Hinman Brothers Construction Company; that The Buckeye Union Casualty Company could not question any of the circumstances surrounding the obtaining of the entry of that judgment but was bound by it.

This decision is in direct conflict with the law of Ohio as established in the case of *Haluka vs. Baker,* 66 Ohio Appeals 308. (No motion to certify was filed.) In affirming the decision of the District Court the Circuit Court of Appeals in effect held that the Federal Courts could be used by the plaintiff and United States Fidelity and Guaranty Company for the express purpose of forcing The Buckeye Union Casualty Company to pay a part of the judgment which had been rendered in the original action by the mere expedient of agreeing with the plaintiff that a judgment might be entered against the assured, although without its knowledge or consent, and that thereafter such judgment could be used as a basis for supplemental proceedings under Section 9510-4 of the General Code of Ohio.

It is our contention that the Federal and State Courts were established for the express purpose of effecting justice as between parties litigant under the law and the usual form of procedure. While we concede that the judgment is final and binding as between the United States Fidelity and Guaranty Company and the plaintiff, since they both in effect agreed to it, it is not binding on Hinman Brothers

Construction Company, because it was rendered without its knowledge or consent and therefore it could not be binding on The Buckeye Union Casualty Company. We think the Supreme Court ought to disapprove of the method of procedure followed in this case.

2. The Buckeye Union Casualty Company's policy (Condition E, *supra*) provides that there would be no liability on its part for any claim against its assured except on a judgment rendered after actual trial. In the original proceeding there was no actual trial but the attorneys for the plaintiff and United States Fidelity and Guaranty Company simply went through the form of a trial. The District Judge who presided at the original hearing, after jury was waived, was not advised as to the purpose of the so-called trial, but was simply requested to sign at the end of the hearing a finding of fact which included the amount of recovery ($15,000.00). He did so and thereafter judgment was entered. We think the Supreme Court ought not, even tacitly, to approve such procedure, but on the contrary ought to place on it its stamp of disapproval.

3. The plaintiff and the United States Fidelity and Guaranty Company could not enter into any agreement, binding on the Hinman Brothers Construction Company without its knowledge or consent nor could it enter into any agreement binding on The Buckeye Union Casualty Company without its consent.

By affirming the judgment of the lower court the Circuit Court of Appeals held that it made absolutely no difference how the judgment was obtained, it would be binding upon the Hinman Brothers Construction Company and under Section 9510-4 of the General Code of Ohio also upon The Buckeye Union Casualty Company. It is our contention that the statute was intended as a means of protecting innocent victims of accident and affording them legal compensation for their injuries in proper cases. There is nothing in the statute which gives to insurance

companies any right to twist the statute in order to enable them to do indirectly what they could not do directly, namely force The Buckeye Union Casualty Company to contribute to the agreed settlement. While we do not deny that the United States Fidelity and Guaranty Company, under its policy, had a right to settle its primary liability to the plaintiff in any manner it saw fit, and could take any means that it thought advisable to protect itself from further responsibility, even to the extent of having a judgment rendered against its assured, and then requiring the plaintiff to satisfy that judgment, we do contend that it could not, by the mere entering of such a judgment agreed upon by itself and the plaintiff, without the knowledge or consent of the common assured, force The Buckeye Union Casualty Company to contribute to that settlement. We contend that the Supreme Court by granting the writ and reversing the judgments below would effectively bar such conduct in the future.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued to the Circuit Court of Appeals for the Sixth Circuit requiring said Court to certify to this Court for review and final determination the complete record of this case in that Court and that the judgment of that Court may be reversed and final judgment be entered in favor of petitioner.

Respectfully submitted,

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PETITIONER'S

BRIEF

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

I.

Has an insurance company in a supplemental proceeding under Section 9510-4 of the General Code of Ohio the right to inquire into the proceedings in the original action in order to establish its policy defenses?

The trial court admitted evidence tending to show how the agreed judgment was obtained, but indicated from the outset that, in its opinion, such evidence was in the nature of an attack on the judgment and might not be considered. The court finally excluded from its consideration such testimony as evidenced in its findings of fact (R. 184). In this respect, prejudicial error was committed, for the appellant did not seek to attack but to explain the type of judgment that was rendered in the original action.

The action against this defendant by reason of Section 9510-4 G. C. is supplemental to the original proceeding.

> "A Supplemental Petition has always been regarded as only ancillary to the original petition; a new and different cause of action can not be raised by a supplemental petition."
>
> 31 *O. J.*, Sec. 316, p. 912.

This proceeding is a part of the original action and the court in order to determine the rights of the parties to the supplemental proceedings, must look into the original proceedings or so much thereof as is necessary for the determination of the supplemental proceedings. *State Automobile Insurance Association vs. Lind,* 122 O. S. 500, syllabus 1:

> "Where a judgment is offered in evidence and it is uncertain from the record what was urged, parol tes-

timony not inconsistent with the record and not impairing its verity is admissible to show what testimony was given and what questions were submitted for determination at the time of the rendition of such judgment, for the purpose of identifying the questions litigated and decided at the former action."

At page 503, Day, *J.*, stated,

"We think the Court of Appeals did not err in that respect; that Lind's attempt was not to collaterally attack such judgment, not to impeach it, but that he had a right to explain such judgment, and that it was competent to offer extrinsic evidence not inconsistent with the record, and not impugning its verity, for the purpose of identifying the points or questions litigated and decided in the former action, and show what certain questions were based on. (Citations following.)"

Decker vs. Kolleda, 57 O. App. 442, syllabus 3:

"Where the insurance company is made a party defendant to the original action by virtue of Section 9510-4 General Code, the trial court may consider all matters pertinent on the face of the record, including prior proceedings although not presented as evidence in the case."

Venditti vs. Mucciaroni, et al., 54 O. App. 513, syllabi:

"(1) In an action by a judgment creditor against an insurance company under favor of section 9510-4 General Code, the defendant insurance company, by having defended insured, the judgment debtor, in the former action in which the insurer was not made a party, is not thereby estopped from setting up the defense that the insurance policy was fraudulently procured and the accident caused by virtue of conspiracy between the insured and plaintiff, where it appears that the insurer had no knowledge of the fraud or conspiracy at the time of the former action.

"(2) Under such facts the first judgment is not *res adjudicata* as to an action brought under favor of Section 9510-4 General Code."

Sciaraffa vs. Debler, 23 N. E. (2nd) 111 (Mass.), syllabi:

"(1) A final judgment can not be impeached or set aside in any collateral proceeding.

"(2) Where minor was denied recovery for hospital and medical expenses in action instituted on his behalf by Father for injuries sustained in automobile accident and minor on becoming of age obtained judgment against assured for such hospital and medical expenses, automobile liability insurer was not precluded by second judgment from investigating the grounds upon which judgment was based or from showing that the cause of action upon which it was entered was not included in its policy of insurance."

The Supreme Court in the following cases went beyond the judgment in the original action to determine the question of coverage. *Beer vs. Beer,* 134 O. S. 273; *Rothman vs. Insurance Company,* 134 O. S. 241.

In the foregoing cases, the court deemed it necessary to examine the original proceedings, including the judgment, to determine the insurer's liability. However, it did not deem its action as an attack on the judgment. It is not possible to attack a judgment without questioning its validity either as to form or substance. We concede the validity of the judgment, but we do have a right to show the type of judgment it is as far as it affects our policy contract.

II.

In a supplemental proceeding against it, is an insurance company estopped from presenting its claims against a third party defendant, also an insurance company, in order to determine which of the companies is liable for the judgment against the common assured in the original action?

The trial court in its written decision held, that for the purpose of maintaining a supplemental complaint under Section 9510-4 G. C. of Ohio, plaintiff-appellee obtained a final judgment in the original action. This fact, however, should not have precluded the appellant from establishing how that judgment was obtained. Ranallo and the U. S. Fidelity & Guaranty do not necessarily occupy the same position with respect to the appellant. Some of appellant's defenses to the supplemental complaint are different from its claims against the U. S. Fidelity & Guaranty. The appellant, under Civil Procedure Rule 14(a), was entitled to have all the defenses and claims made against the appellees considered by the court even though the agreed judgment was final in the sense that it terminated the original action. It follows then that the authorities cited under Argument I apply with equal force to the defendant-appellee, the U. S. Fidelity & Guaranty, and the part that it played in obtaining the judgment and otherwise to determine the rights of all the parties herein.

A preponderance of the evidence supported a finding that plaintiff-appellee with the consent and approval of the U. S. Fidelity & Guaranty obtained a final judgment, but that it was obtained without the knowledge of the Hinman Brothers Construction Company and without actual trial. Therefore, it could not be enforced against either the Hinman Brothers Construction Company or the Buckeye Union Casualty Company. The court, by considering all of the testimony, would have been forced to the conclusion that although plaintiff-appellee had obtained a final

judgment for the purpose of maintaining a supplemental complaint, the judgment could only be enforced against the defendant-appellee, because it was the product of its own volition which discharged its primary liability under its contract of insurance with the Hinman Brothers Construction Company.

There is another salient reason why this Court should examine the proceedings resulting in the judgment in determining appellant's liability under its contract of insurance. Section 9510-4 G. C. of Ohio was passed long before the adoption of the present rules of Federal Civil Procedure, which require the trial court specially to find the facts and to state separately its conclusions of law in directing the entry of the appropriate judgment. Under the Ohio Decisions, if such findings of fact and conclusions of law were determined by the court from the evidence after actual trial, they would be *res adjudicata* in an action against an Insurance Company on a supplemental complaint. This procedure is not followed in our State Courts, and the appellant on the supplemental complaint could have litigated the question as to whether or not the accident occurred on the insured's premises as described in its policy of insurance.

In the instant case, the definition of "insured's premises," as contained in appellant's insurance policy, and that the accident occurred thereon, is specifically incorporated in the findings of fact and conclusions of law approved by Hon. Judge Wilkin. Did Judge Wilkin make the findings of fact and give his conclusions of law in connection with the Fifteen Thousand Dollar judgment? Counsel for Ranallo and the U. S. Fidelity & Guaranty admitted that the findings of fact and conclusions of law were *prepared in advance* of the hearing. Hon. Judge Wilkin stated that the same *were submitted* to him *immediately following the conclusion of the testimony.* The Judge further stated that, at the time of the arrangement for the

assignment of the case, Messrs. Sogg and Horn definitely stated that the case *would not be contested,* as cases ordinarily are contested.

Taking the testimony as a whole, it will be noted throughout the original hearing that Mr. Horn, attorney for the defendant, *instead of defending* the Hinman Brothers Construction Company, *collaborated* with Mr. Sogg in *establishing a prima facie case for the plaintiff.* The price for this collaboration was the inclusion in the findings of fact, the description of the project covered by the policy of the appellant, and that the accident occurred on such premises. That this was a part of the deal between Messrs. Horn and Sogg is best evidenced by the fact that the description of the contractor's premises *could have no possible bearing* on the question of the defendants, the Hinman Brothers Construction Company's liability with reference to the accident, but the description *was very material* in determining the *coverage of* the policy issued by the *appellant.*

In the light of this situation, it may be safely stated that the findings of fact and conclusions of law and the amount of the judgment was the agreement of Ranallo and the U. S. Fidelity & Guaranty Company acting through its counsel, entered upon the record with the sanction and approval of the court and their act rather than the act of the court. There is not the slightest doubt but that the court had full authority to sanction any agreement entered into between the appellees and to reduce the same to a judgment, but nevertheless it was *only the agreement* of the parties and *not the judgment* of the court based on its *own findings* and reasonings and certainly *not the result of an actual trial.* Such a judgment is defined in 34 *C. J.,* Section 331, page 129:

> "A judgment by consent of the parties is a judgment, the provisions and terms of which are settled and agreed to by the parties to the action in which it is entered and which is entered of record by the consent

and sanction of the court. It is not the judgment of the court except in the sense that the court allows it to go upon the record and have the force and effect of a judgment; it is the agreement of the parties entered upon record with the sanction and approval of the court and is their act rather than that of the court."

The appellant entered into a written contract with the Hinman Brothers Construction Company, covering limited operations in connection with the project described therein. Neither Ranallo nor the U. S. Fidelity & Guaranty were in privity to the contract. Why should the appellant or the Hinman Brothers Construction Company be bound by any acts of these strangers to the contract merely because they succeeded in incorporating a description of the insured's premises in their *agreed* findings of fact and conclusions of law subsequently sanctioned by the court, especially when the court was not informed as to why it was necessary to include the description of said project in the findings of fact and conclusions of law?

We reiterate that the defendant-appellee, under its contract of insurance, reserved the right to enter into such an agreement with plaintiff-appellee without first obtaining the consent and approval of its insured, the Hinman Brothers Construction Company. Therefore, it was strictly their agreement sanctioned by the court at their request, and they should not be permitted to call upon the appellant or the Hinman Brothers Construction Company, who were and are perfect strangers to the said agreement, to participate in its enforcement.

"Courts have the general power of entering judgment by consent of the parties, and a judgment may properly be entered by a court for the purpose of carrying out a settlement and compromise of a suit, etc."

23 *O. J.*, Sec. 418, p. 758;

31 *Am. Juris.*, Sec. 458, p. 105.

Mr. Horn denies that he entered into an agreement for the settlement of this case or to the agreed judgment approved by the court. However, Mr. Horn's conduct, preceding the entry of judgment, and Mr. Sogg's testimony do not support those denials. There is every evidence of Mr. Horn's tacit consent to all of the proceedings preceding the judgment, as Messrs. Horn and Sogg stated in their testimony.

(R. 109)—Mr. Horn:

> "Q. Prior to the trial of the case, did you and Mr. Sogg agree as to what the amount of the judgment should be?
>
> A. No, not exactly."

Mr. Sogg—(R. 130):

> "Q. You have told us what you said at this conference. Now, what did Mr. Horn say?
>
> A. Well, Mr. Horn, he didn't say hardly anything. He merely listened, and I just took it for granted,—I suppose the court did, as well,—as we say in law, silence means consent. Etc."

The trial court's findings that there was no agreement to settle the original case, and that the judgment was obtained after actual trial is contrary to the evidence.

III.

Did Ranallo, plaintiff in the original case, by entering into what amounts to an agreed judgment with the United States Fidelity and Guaranty Company, third party defendant, violate condition "E" of appellant's policy of insurance (supra) and thereby relieve the appellant from any liability under its policy?

Plaintiff-appellee in the supplemental action against the appellant became a judgment creditor, and had no higher or greater right to recover than the assured, and the same defenses were available against each of them. *Stacy*

vs. The Fidelity and Casualty Company of New York, et al., 114 O. S. 633, syllabus 3:

> "By the provisions of Section 9510-4 General Code, a judgment creditor is entitled to a direct action against the insurance company after obtaining a judgment against the assured and after the lapse of thirty days after judgment is rendered, provided that any valid conditions in the contract of insurance pertaining to notice of the accident, or of a claim being made on account of such accident, or of suit being brought against the insured on account of casualty coming within the terms of said policy which would be binding upon the assured are likewise binding upon such judgment creditor."

On page 640, Marshall, *C.J.*, stated:

> "There are so many conceivable reasons why the same defenses should be made against the injured party as against the insured that it requires no elaborate course of reasoning to reach the conclusion that any effort to place the insured person in a favorite position, contrary to the terms of the policy contract, would be in contravention of the due process clauses of the State and Federal Constitutions."

Burtz vs. Stern, 135 O. S. 225;

Storer vs. Accident and Guaranty Company, 80 Fed. (2nd) 470.

The trial court, in its memorandum opinion, stated (R. 177), that the letter sent by appellant to the Hinman Brothers Construction Company indicated such finality of disclaimer that any communication or notice by the insured was a useless gesture. The letter referred to (R. 159) stated in part that the appellant's investigation disclosed that the accident occurred on a *public way used in common with others.* This was a defense under its policy of insurance (R. 145). The assured, the Hinman Brothers Construction Company, after receiving the letter, at no time disputed appellant's position or in any way called on it to

join in the defense of the primary action. Appellant thereby had a right to assume that it acquiesced in that contention.

In any event, the letter was not an unconditional disclaimer and the assured had a duty to inform the appellant of its attitude in the premises. Plaintiff-appellee, before and after filing the primary action, knew of the existence of the appellant's policy of insurance and the reason for its disclaimer thereunder. Therefore, in order to place himself in the position of the Hinman Brothers Construction Company for the purpose of enforcing the appellant's insurance policy, he not only had the duty of notifying the appellant of the approaching hearing, but actually trying the case. He chose, however, to ignore the appellant and the Hinman Brothers Construction Company by entering into an arrangement and agreement to settle his claim with the defendant-appellee for Fifteen Thousand and no/100 ($15,000.00) Dollars, and thereby not only prevented the appellant's assured from carrying out its contract of insurance but he himself failed to comply with the provisions thereof for the purpose of maintaining an action as judgment creditor under Section 9510-4 G. C. of Ohio.

Putting it in another form, if the Hinman Brothers Construction Company instead of the U. S. Fidelity & Guaranty Company, under the circumstances of this case, carried on negotiations for settlement with Ranallo, they would have had the duty of notifying the appellant of its action and extend it the opportunity of participating in such proceedings. We contend that the plaintiff-appellee had a similar duty in order to avail himself of the benefits of the appellant's policy of insurance. 125 O. S. 581, *Hartford Accident & Indemnity Company vs. Randall, et al.*, syllabus 4:

> "A person injured by the assured in such manner as to entitle the assured to indemnity under the policy, has such potential beneficial interest in the policy, by

the provisions of Section 9510-4, General Code, as to warrant such injured person to comply with the terms and conditions of the policy agreed to be performed by the assured, even though such performance be without the knowledge or concurrence of the assured, and a waiver to such injured party is equivalent to a waiver to the assured."

IV.

Does a judgment in the original action brought by Pat Ranallo against Hinman Brothers Construction Company, the common assured, impose upon the Hinman Brothers Construction Company a "liability by law for damages" (Insuring Agreement I of Buckeye Union policy, supra) where the plaintiff and United States Fidelity and Guaranty Company settled and agreed upon in advance the findings of fact, the conclusions of law and the amount of judgment, prior to the rendition of said judgment and without the knowledge or consent of the nominal defendant, Hinman Brothers Construction Company?

The third party defendant, under Insuring Agreement II and Condition 7 of its policy, specifically reserved the right to settle or litigate in the name of its insured as it saw fit, any claim under its contract and the insured was required to co-operate and not interfere in its handling of the litigation or settlement.

Mr. Horn stated that he was running the law suit (R. 90), and saw no reason to notify the Hinman Brothers Construction Company that the hearing was to be had on May 27, 1941. As counsel for the U. S. Fidelity & Guaranty, under its contract of insurance with the Hinman Brothers Construction Company, he had a perfect right so to ignore them. By the same token, however, the mere use of its assured's name did not bind them for the acts of Mr. Horn, even though he was counsel of record in the primary action. Why? Because the U. S. Fidelity & Guaranty in its contract of insurance reserved the right to act

independently of the Hinman Brothers Construction Company. We, therefore, contend that, regardless of the attitude of the Hinman Brothers Construction Company to the coverage of the Buckeye Union Casualty Company with respect to this accident, the independent acts of Mr. Horn, as counsel for the United States Fidelity & Guaranty, done *without the knowledge and consent* of the Hinman Brothers Construction Company, were in no wise binding on it so as to make the agreed judgment a *liability imposed on it by law*. This question is covered by the case of *Haluka vs. Baker*, 66 O. App. 308, the syllabus of which is as follows:

> "Where a liability insurer, by its policy contract, reserves to itself the right to defend, in the name of the insured, actions to recover for personal injuries or property damage, to employ counsel of its own choosing, to litigate or settle as it sees fit, and the insured is, by the contract, not permitted to interfere with the insurer's handling of the litigation or settlement, but is required to assist and cooperate with the insurer in the investigation, preparation and presentation of the defense, such insurer in settling such litigation without the express consent of the insured, or without his subsequent ratification of the insured's handling thereof, *acts in its own behalf*, and *not as the agent of the insured*. Under such circumstances, the *insured is not personally bound* by the agreement of settlement made by the insurer, unless it was expressly authorized or subsequently ratified by him, and he likewise *is not bound to pay* the amount of the settlement agreed upon." (Italics ours.)

There is no evidence of a subsequent ratification of the consent judgment by the Hinman Brothers Construction Company, and there could be no valid ratification without some consideration. Assuming, however, that there was a subsequent ratification by the Hinman Brothers Construction Company, it would then become a liability assumed by the insured by contract or agreement, oral or written. Such liability is specifically excluded in the appellant's policy, Agreement III, Condition I (R. 145):

"any liability of others assumed by the insured under any contract of agreement, oral or written."

All in all, Ohio stands for the proposition that a settlement in the form of a judgment or otherwise entered into between an insurer and the injured party, is only binding on them and can not be enforced against any other party.

Royal Indemnity Company vs. McFadden, et al., 65 O. App. 15, syllabus 2:

> "An action for specific performance of a compromise agreement between an insured and an injured party and for an injunction to restrain the injured party from prosecuting an action for personal injuries against the insured, can not be maintained by the insurer. Such settlement can be set up as a defense in the personal injury action under Section 11315, General Code."

V.

Is United States Fidelity and Guaranty Company, third party defendant, having entered into an agreement which amounts to a voluntary settlement with Ranallo, the original plaintiff, thus discharging its primary liability under its contract, estopped from obtaining contribution from The Buckeye Union Casualty Company either directly or indirectly?

Counsel for the U. S. Fidelity & Guaranty and Ranallo, after agreeing on a settlement of the case, we prefer not to say colluded, but certainly agreed on a procedure for the sole purpose of invoking the coverage of the Buckeye Union Casualty Company. The appellant can not now concern itself with the location of the accident with respect to the assured's premises as described in its policy of insurance. That was a controversial question, which it was precluded from trying, by reason of the action of Ranallo and the U. S. Fidelity & Guaranty Company.

By the terms of the U. S. Fidelity & Guaranty policy this accident was covered as long as it occurred in the United States of America, Canada or New Foundland (Insuring Agreement V). By the policy of the Buckeye Union Casualty Company, it would be covered only if it occurred on the insured's premises. The insured's premises are specifically described in the agreed finding of fact. Counsel for the United States Fidelity & Guaranty, acting in the name of the Hinman Brothers Construction Company, and not counsel for Ranallo, brought the description into the limited evidence. Both counsel knew that without the description in the agreed findings of fact, the appellant was out of the picture. Both counsel also knew that the *description* of the insured's premises had *nothing to do* with *Ranallo's right to recover* on the question of liability. Could there be any doubt about the prearrangement? We think not, especially when it is to be remembered that after obtaining the agreed judgment, the supplemental complaint was filed against the appellant alone, when Mr. Sogg knew of the other coverage by reason of his dealings with Mr. Horn.

There was a mutual benefit to be gained by Ranallo and the U. S. Fidelity & Guaranty from their agreement. Mr. Sogg could obtain his judgment long before regular trial date, and Mr. Horn knew that the only way he could get the appellant into the picture without an actual trial was through Mr. Sogg. The U. S. Fidelity & Guaranty voluntarily participated in the foregoing scheme with the full realization that by voluntarily entering into the consent judgment, it was discharging its own primary liability under its contract with the Hinman Brothers Construction Company, and that the most that they could accomplish through such action was to cause a contribution toward its settlement through the co-operation of Ranallo in maintaining a supplemental complaint against the appellant. The U. S. Fidelity & Guaranty confessed its primary liability in

its amended answer to the third party complaint (R. 33), and having voluntarily entered into an agreement to settle the claim can not now, directly or indirectly, ask that a third party contribute to the discharge of its agreement. In the case of *Builders and Mfrs. Mut. Casualty Company vs. Preferred Automobile Ins. Co.,* 118 Fed. (2nd) 118, at 121, the Court stated:

> "Taking into consideration the record as a whole, the judgment must be affirmed for the reason that when the Mutual Company settled the States suits by payment of the amounts agreed upon, it discharged its own primary liability, and can not now recover the identical amount which it agreed in its contract of insurance to pay."

The only difference in the foregoing case and the case at bar is that in the former, the obligation was discharged before the commencement of the action, while in the latter the obligation was definitely incurred but not discharged before the commencement of this action. This difference of fact does not in any way alter the proposition at law.

VI.

Did the evidence introduced by Ranallo, appellee, against appellant at the hearing of the supplemental complaint establish a prima facie case against the appellant?

In support of his cause of action against the appellant, Ranallo introduced the judgment in the original action, appellant's policy issued to the Hinman Brothers Construction Company, and a letter written by Alex S. Dombey, counsel for the appellant. In the case of *Decker vs. Kolleda, supra,* syllabus 2 states:

> "In such case, one who has recovered a judgment against the insured and seeks judgment against the insurance company under Section 9510-4 general code must show that the notice was given according to the policy, or establish facts which would dispense with notice, before liability may be imposed against the In-

surance Company. *The failure of the Insurance Company to defend in the action against the insured does not constitute a waiver of the provisions of the policy as to notice.*" (Emphasis supplied.)

The appellant did not waive any provisions of its insurance policy by suggesting that it should not accept any liability for the accident. Its out and out refusal to defend the action did not waive any of the policy conditions. Introduction of the judgment and policy of insurance did not on its face show compliance with the policy provisions and conditions. The Hinman Brothers Construction Company was not called to show that it in any way complied with the policy conditions. Counsel for Ranallo did not contend that the judgment was obtained after an actual trial. The Hon. Judge Wilkin stated that it was definitely understood at the time of the assignment that the case would not be contested. That only left the letter. Appellant objected to its introduction because it was not sufficiently identified, but its substance in no way tended to show a compliance by the Hinman Brothers Construction Company with the provisions of the policy, nor did it waive any conditions of the policy.

Ranallo introduced the policy of insurance as a part of his case, including Condition E thereof. The uncontroverted evidence thereafter disclosed that there was a failure to comply with Condition E. Ranallo, having collaborated with the U. S. Fidelity & Guaranty, to bring on the situation that resulted in the non-compliance, is bound by it. In any event, Ranallo did not meet the burden of proof establishing compliance with the condition, and appellant's motion to dismiss at the conclusion of his evidence should have been sustained. *Monthey vs. American Auto Insurance Company,* 18 A. (2nd) 397 (Conn.), syllabus 4:

"In insured's action on automobile liability policies to recover amount of judgments rendered against him, where insurer raises issue of violation of some par-

ticular condition of the policy by a special defense, burden of proving the issue is on the insured."

VII.

Can the plaintiff and the United States Fidelity and Guaranty Company use the courts for the purpose of forcing The Buckeye Union Casualty Insurance Company to contribute to their agreed settlement, by waiving a jury, going through the form of a trial to the Court and asking the presiding judge to render a judgment against Hinman Brothers Construction Company for the agreed amount of $15,000.00 and thereby fix a liability upon The Buckeye Union Casualty Company for a proportionate share of such judgment when Hinman Brothers Construction Company is not in any way consulted about the procedure and knows nothing about the judgment against it until after it had been entered?

The trial judge in his findings of fact (R. 184) concluded that,

> "The judgment of $15,000 and costs obtained by the plaintiff against the Hinman Brothers Construction Company on May 27, 1941, was a final judgment rendered by this Court after actual trial and upon the evidence submitted, all as indicated in the Findings of Fact and Conclusions of Law made and entered herein by the Court on May 27, 1941."

Hon. Judge Wilkin testified in part (R. 85) as follows:

> "In arranging the assignment it was definitely stated that this was not a case that would be contested as cases ordinarily are contested,—cases of this kind."

During the examination of Mr. Horn, Judge Freed made the following comment on Judge Wilkin's testimony (R. 92):

"The Court: Of course Judge Wilkin's testimony is the truth of the matter, and the only purpose of this question would be to impeach Judge Wilkin's testimony."

It seems plain from a reading of the uncontroverted evidence that the court is dealing with an agreed or consent judgment.

In answer to any possible claim that this judgment was obtained on the evidence introduced in the original hearing, we say that we do not propose to insult the intelligence of Mr. Horn, or in any way reflect on his professional standing, by insinuating that he defended the interests of his client, the U. S. Fidelity & Guaranty, to the extent of presenting even a colorable defense to the merits of the case. At the same time, we may concede that Mr. Sogg is one of the best plaintiff negligence attorneys in the country, but we could not glorify his ability to the extent of suggesting that he or any one else could obtain a Fifteen Thousand Dollar verdict on the testimony presented at the original hearing. Then too, knowing the Hon. Judge Wilkin as we do, we are perfectly safe in saying that neither Mr. Sogg, nor any other attorney, could prepare in advance findings of fact and conclusions of law in any case, wherein the good Judge was called upon to decide a controversy, let alone approve the same as to form and substance without raising that first question.

Mr. Horn, throughout his testimony, attempted to escape the death trap by avoiding his part in the settlement. Yet, by his own admissions, he was consulted by Mr. Sogg at every stage of the proceeding, passed on all of the instruments necessary to secure the judgment, and stood silently by while Mr. Sogg made the necessary arrangements. The testimony that would have disclosed the entire agreement and arrangements between the parties and their counsel was excluded as privileged communication. This fact should be carefully considered by this

Court in determining whether, by the testimony available to the appellant, an agreement to settle by way of a consent judgment was established.

From the testimony of Mr. Sogg, we know that at no time did he ask more than Fifteen Thousand Dollars in settlement of this case. The record also discloses that shortly after filing the original complaint, he carried on all of his negotiations with Messrs. Horn and Trebisky, representatives of the U. S. Fidelity & Guaranty, and with Mr. Horn's co-operation assigned the case for hearing out of its regular order and obtained an uncontested judgment in the amount of his demand, to wit: $15,000.00. Thereafter, with full knowledge of the U. S. Fidelity & Guaranty coverage, Mr. Sogg filed a supplemental complaint *against the Buckeye Union Casualty Company alone*. These facts, taken in the light of his testimony, show a complete understanding and co-operation between counsel for the purpose of attempting to collect a portion of their *agreed* settlement against the appellant.

It is also plain from the evidence that Mr. Horn and his firm undertook the defense of the Ranallo action as counsel for the U. S. Fidelity & Guaranty under their contract of insurance with the Hinman Brothers Construction Company. They made such use of their insured's name as was necessary to carry out the provisions of that contract, and it was not contended by any one that the Hinman Brothers Construction Company engaged Mr. Horn or his firm to perform any acts in connection with the handling of the claim outside of the terms of their contract of insurance (R. 58). Thus, all of the acts of Mr. Horn are deemed the acts of the U. S. Fidelity & Guaranty and not those of the Hinman Brothers Construction Company.

The Hinman Brothers Construction Company, in the supplemental proceeding, did not claim any rights against the appellant, nor request that the appellant be required to contribute to the satisfaction of the settlement or consent judgment.

The U. S. Fidelity & Guaranty, through its counsel, in discharging its primary liability under its contract of insurance, without the knowledge of the Hinman Brothers Construction Company, agreed with Mr. Sogg on a procedure to place the accident within the Buckeye coverage. They then proceeded to have it sanctioned by the court without assigning to the court any reason therefor, with the hope that like their alleged privileged communications, the subterfuge would be concealed by the cloak of the finality of the judgment. The exposition of the motive for the procedure is found in the amended answer to the third party complaint—its offer to confess judgment for its alleged pro rata share of the consent judgment.

CONCLUSION.

Plaintiff-appellee, in his answer to the Third Party Complaint of the Buckeye Union Casualty Company (R. 31), readily admitted that he knew that the third party defendant issued its policy of insurance to the Hinman Brothers Construction Company, as described in the third party complaint. He further admitted that the third party defendant, through its counsel, was notified of the original action and undertook the defense thereof. Those admissions and the subsequent joint and several acts of plaintiff-appellee and the third party defendant, through their counsel, relieved the Buckeye Union Casualty Company from liability for any portion of the consent judgment.

Plaintiff-appellee, in the same answer, prays judgment for Fifteen Thousand and no/100 ($15,000.00) Dollars, against the U. S. Fidelity & Guaranty if the Buckeye Union Casualty Company is not liable. This is the only judgment that the court could have entered on the evidence in the supplemental proceedings and should be entered by this Court for the following reasons:

(1) There is no evidence that Ranallo or the Hinman Brothers Construction Company complied with the provi-

sions of the Buckeye Union Casualty Company insurance policy.

(2) The action of Ranallo and the U. S. Fidelity & Guaranty in entering into an agreement prevented the Hinman Brothers Construction Company from carrying out its contract of insurance with the Buckeye Union Casualty Company.

(3) The agreed or consent judgment, having been entered without the knowledge or consent of the Hinman Brothers Construction Company, was not a liability imposed on it by law as provided for in the Buckeye Union policy of insurance.

(4) The consent judgment, having been obtained without an actual trial, is not covered by the Buckeye Union policy of insurance.

(5) The U. S. Fidelity & Guaranty, by its agreement with Ranallo, *discharged its primary liability under its policy of insurance*, and can not directly or indirectly seek a contribution from the third party.

(6) Ranallo's evidence on the supplemental proceedings was insufficient to establish a prima facie case against the appellant.

Respectfully submitted,

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